



ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the Senior Procurement Executives of DOE and NNSA

Subject: Implementation of Division A, Title III and Title V of the Energy and Water, Legislative Branch, and Military Construction and Veterans Affairs Appropriations Act, 2019, Pub. L. No. 115-244

References:

Energy and Water, Legislative Branch,
and Military Construction and Veterans
and Veterans Affairs Appropriations Act,
2019, Pub. L. No. 115-244

Division A, Title III, Sections 301,
303, 304, 306 and Title V, Section
501.

Department of Defense and Labor, Health and
Human Services, and Education Appropriations
Act, 2019 and Continuing Appropriations Act, 2019,
Pub. L. No. 115-245

Division C

When is this Acquisition Letter (AL) effective?

The statutory provisions addressed in this AL are effective as of October 1, 2018.

When does this AL expire?

This AL is in effect for FY 19. This AL and all previous ALs on appropriations will be archived after the end of the applicable AL. Generally, the guidance will remain in effect when obligating dollars appropriated under that applicable Act. Please request assistance from your local counsel for applicability after the end of an FY.

Who is the point of contact?

For DOE, contact Jason Taylor of the Contract and Financial Assistance Policy Division, Office of Policy at (202) 287-1560 or at Jason.Taylor@hq.doe.gov, or for NNSA, contact NNSA at (505) 845-4337.

Who is the intended audience?

Department of Energy (DOE) and National Nuclear Security Administration (NNSA) Contracting Officers.

What is the purpose?

The purpose of this AL is to provide information and guidance regarding the Department of Energy's (DOE or Department) implementation of Division A, Title III and Title V of the Energy and Water, Legislative Branch, and Military Construction and Veterans Affairs Appropriations Act, 2019, Pub. L. No. 115-244 and Division C of the Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245.

The government-wide provisions of the Consolidated Appropriations Act, 2018 (Pub. L. No. 115-31) have been extended until December 7, 2018 by Division C of the Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245. Please see Acquisition Letter 2018-12 for the implementation guidance applicable to Division E, Title VII, Sections 735, 739, 743, 744, 745 and 746 of the 2018 Act.

The Congressional notification requirements of Pub. L. No. 115-244 will be addressed in a separate Acquisition Letter/Financial Assistance Letter.

What types of contracts are affected by this AL?

This AL applies to all DOE and NNSA solicitations and contract actions including task and delivery orders funded with fiscal year 2019 appropriated funds.

What guidance is included in this AL?

Appropriations Act

- I. Section 301(a) Unfunded Requests for Proposals**
- II. Section 301(c) Multiyear Award Funding for DOE—Energy Programs and Section 306 Multiyear Award Funding for DOE—Energy Programs—Science (From Section 306 of Division D of the 2016 Act)**
- III. Section 303 Construction of High-hazard Nuclear Facilities**
- IV. Section 304 Independent Cost Estimate (ICE) for Critical Decision (CD)-2 and CD-3 DOE O 413.3B Construction Projects**
- V. Section 306 Prohibition on Awards to the Russian Federation**
- VI. Section 501 Lobbying Restrictions**

NOTE: The congressional notification requirements of Section 301(b) and 301(c) will be addressed in a separate AL.

I. SECTION 301(a) UNFUNDED REQUESTS FOR PROPOSALS

What is the law?

No appropriation, funds, or authority made available by this title for the Department of Energy shall be used to initiate or resume any program, project, or activity or to prepare or initiate Requests For Proposals or similar arrangements (including Requests for Quotations, Requests for Information, and Funding Opportunity Announcements) for a program, project, or activity if the program, project, or activity has not been funded by Congress.

What is the scope of this requirement?

Division A of P.L. 115-244 requires that funds appropriated by the Act not be used to prepare or initiate RFPs or similar arrangements (including request for quotations, requests for information and funding opportunity announcements) for a program, project or activity if the program, project or activity has not been funded by Congress.

What procedures need to be followed to implement this requirement?

Before preparing or initiating a RFP or similar arrangements (including request for quotations or requests for information) in support of a program, project or activity, the Contracting Officer shall work with the program office and the program budget office officials to ensure the program or project has been funded by Congress.

II. Section 301(c) Multiyear Award Funding for DOE—Energy Programs and Section 306 Multiyear Award Funding for DOE—Energy Programs—Science (From Section 306 of Division D of the 2016 Act)

What is the law?

(c) The Department of Energy may not, with respect to any program, project, or activity that uses budget authority made available in this title under the heading “Department of Energy—Energy Programs”, enter into a multiyear contract, award a multiyear grant, or enter into a multiyear cooperative agreement unless—

- (1) the contract, grant, or cooperative agreement is funded for the full period of performance as anticipated at the time of award; or
- (2) the contract, grant, or cooperative agreement includes a clause conditioning the Federal Government’s obligation on the availability of future year budget authority and the Secretary notifies the Committees on Appropriations of both Houses of Congress at least 3 days in advance.

The Consolidated Appropriations Act, 2016, provided that none of the funds made available under the heading “Department of Energy—Energy Programs—Science” in this **or any subsequent Energy and Water Development and Related Agencies appropriations Act for any fiscal year** may be used for a multiyear contract, grant, cooperative agreement, or Other Transaction (OT) Agreement of \$1,000,000 or less unless the contract, grant, cooperative agreement, or Other Transaction Agreement is funded for the full period of performance as anticipated at the time of award.

What is the scope of this requirement?

Section 301(c) of Division A of the 2019 Act requires multiyear contracts, grants, or cooperative agreements awarded with budget authority or funds appropriated by the 2019 Act under the heading “Department of Energy—Energy Programs must be funded for the full period of performance as anticipated at the time of award; or the contract, grant, or cooperative agreement include a clause conditioning the Federal Government’s obligation on the availability of future year budget authority **and** the Secretary notifies the Committees on Appropriations of both Houses of Congress at least 3 days in advance.

Furthermore, Section 306 of Division D of the 2016 Act requires that multiyear contracts, grants, cooperative agreements, or Other Transaction Agreements of \$1,000,000 or less awarded **with funds appropriated by the 2016 Act or any subsequent Energy and Water Development and Related Agencies appropriations Act for any fiscal year** under the heading “Department of Energy—Energy Programs—Science” must be funded for the full period of performance as anticipated at the time of award.

What procedures need to be followed to implement this requirement?

Contracting and Grants Officers awarding multiyear contracts, grants, or cooperative agreements with budget authority or funds appropriated by the 2019 Act under the heading “Department of

Energy—Energy Programs” must ensure that the funds for the full period of performance as anticipated at the time of award are available prior to award and obligated at award or the contract, grant, or cooperative agreement includes a clause conditioning the Federal Government’s obligation on the availability of future year budget authority and the Secretary notifies the Committees on Appropriations of both Houses of Congress at least 3 days in advance of award.

Furthermore, Contracting Officers awarding multiyear contracts, grants, cooperative agreements, or Other Transaction Agreements of \$1,000,000 or less with funds appropriated by the 2016 Act or any subsequent Energy and Water Development and Related Agencies appropriations Act for any fiscal year under the heading “Department of Energy—Energy Programs—Science” must ensure that the funds for the full period of performance, as anticipated at the time of award, are available prior to award and obligated at award.

“Multiyear contract” or “Multi-year contract”, as defined at FAR 17.103, means a contract for the purchase of supplies or services for more than 1, but not more than 5, program years. A multiyear contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds, and (if it does so provide) may provide for a cancellation payment to be made to the contractor if appropriations are not made. The key distinguishing difference between multiyear contracts and multiple year contracts is that multiyear contracts, defined in the statutes cited at FAR 17.101, buy more than 1 year’s requirement of a product or service without establishing and having to exercise an option for each program year after the first.

“Multiyear grant or multiyear cooperative agreement award” or “Multi-year grant or multi-year cooperative agreement award” means a new or renewal award with a project period greater than 12 months, excluding continuation amendments.

III SECTION 303 CONSTRUCTION OF HIGH-HAZARD NUCLEAR FACILITIES

What is the law?

None of the funds made available in title III of this Act shall be used for the construction of facilities classified as high-hazard nuclear facilities under 10 C.F.R. Part 830 unless independent oversight is conducted by the Office of Enterprise Assessments to ensure the project is in compliance with nuclear safety requirements.

What is the scope of this requirement?

Section 303 of Division A of the 2019 Act, applies to all solicitations and awards of DOE contracts that include the construction of facilities classified as DOE nuclear facilities (hazard category 1 or 2) under 10 C.F.R. Part 830 under which funds are made available by this Act. This requirement applies to subcontract actions, including subcontracts under an M&O prime contract using these appropriated funds.

What procedures need to be followed to implement this requirement?

When funding the construction of DOE nuclear facilities (hazard category 1 or 2), the contracting officer shall work with the designated federal project director (FPD) to ensure that the Office of Enterprise Assessments performs the required independent review of the project, and should obtain a copy of the review(s) prior to obligating funds under the 2019 Act.

IV. SECTION 304 INDEPENDENT COST ESTIMATE (ICE) FOR CRITICAL DECISION (CD) CD-2 AND CD-3 DOE ORDER 413.3B CONSTRUCTION PROJECTS

What is the law?

None of the funds made available in title III of this Act may be used to approve critical decision-2 or critical decision-3 under Department of Energy Order 413.3B, or any successive departmental guidance, for construction projects where the total project cost exceeds \$100,000,000 until a separate independent cost estimate has been developed for the project for that critical decision.

What is the scope of this requirement?

Section 304 of Division A of the 2019 Act applies to all DOE solicitations and awards that include DOE Order (DOE O) 413.3B construction work where a project with a total project cost (TPC) exceeds \$100,000,000. No funds are available until a separate independent cost estimate (ICE) has been developed for the project for CD-2 or CD-3. This requirement applies to subcontract actions, including subcontract under an M&O prime contract using these appropriated funds.

What procedures need to be followed to implement this requirement?

For a DOE O 413.3B construction project with a total project cost (TPC) or high end cost range exceeding \$100,000,000, the contracting officer shall work with the designated FPD to ensure that an independent cost estimate (ICE) led by the Office of Project Management Oversight and Assessments is conducted prior to submission of CD-2 or CD-3 for approval by the Acquisition Executive (AE).

V. SECTION 306 PROHIBITION ON AWARDS TO THE RUSSIAN FEDERATION

What is the law?

(a) None of the funds made available in this or any prior Act under the heading “Defense Nuclear Nonproliferation” may be made available to enter into new contracts with, or new agreements for Federal assistance to, the Russian Federation.

(b) The Secretary of Energy may waive the prohibition in subsection (a) if the Secretary determines that such activity is in the national security interests of the United States. This waiver authority may not be delegated.

(c) A waiver under subsection (b) shall not be effective until 15 days after the date on which the Secretary submits to the Committees on Appropriations of both Houses of Congress, in classified form if necessary, a report on the justification for the waiver.

What is the scope of this requirement?

Section 306 of Division A of the 2019 Act requires that none of the funds made available in this or any prior Act under the heading “Defense Nuclear Nonproliferation” be made available to enter into new contracts with, or new agreements for Federal assistance to, the Russian Federation unless the Secretary of Energy waives the prohibition.

What procedures need to be followed to implement this requirement?

Contracting Officers may not make any new awards with funds made available in this or any prior Act under the heading “Defense Nuclear Nonproliferation” to the Russian Federation. Contracting Officers may not provide any additional funding to previous awards made to the Russian Federation with funds made available in this or any prior Act under the heading “Defense Nuclear Nonproliferation”.

The Secretary of Energy may waive this prohibition if the Secretary determines that such activity is in the national security interests of the United States. This waiver authority may not be delegated. The waiver shall not be effective until 15 days after the date on which the Secretary submits to the Committees on Appropriations of the House of Representatives and the Senate, in classified form if necessary, a report on the justification for the waiver.

VI. SECTION 501 LOBBYING RESTRICTION

What is the law?

None of the funds appropriated by this Act may be used in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before Congress, other than to communicate to Members of Congress as described in 18 U.S.C. § 1913.

What is the scope of this requirement?

Section 501 applies to all solicitations and awards of DOE contracts under which funds appropriated under Division A of the 2019 Act are obligated.

What procedures need to be followed to implement this requirement?

The following clause shall be incorporated into solicitations and awards of contracts funded under the 2019 Act:

Lobbying Restriction

The Contractor agrees that none of the funds obligated on this award shall be expended, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before Congress, other than to communicate to Members of Congress as described in 18 U.S.C. § 1913. This restriction is in addition to those prescribed elsewhere in statute and regulation.

(End of Clause)